No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE L. PRECYTHE, DIRECTOR,
MISSOURI DEPARTMENT OF CORRECTIONS, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE FORMER CORRECTIONS OFFICIALS SUPPORTING PETITIONER

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INTEREST OF THE AMICI CURIAE[1]

Amici Curiae are former corrections officials, many of whom have firsthand experience administering the death penalty. Amici submit this brief supporting petitioner to emphasize the heavy burden that executions place on the people who must carry them out—a burden that becomes intolerable when, as here, there is a grave risk that a botched execution will result in excessive pain and suffering. They urge the Court to consider not only the immorality of executing a man using cruel and unusual means, but also the harm to public servants who participate in such an act. Amici are:

Frank AuBuchon
Criminal Justice Consultant; Texas Department of Criminal Justice-Institutional Division (1981-2007)

Allen Ault
Dean, Eastern Kentucky University College of Justice and Safety (2003-2015); former Chief, National Institute of Corrections; former corrections commissioner in Colorado, Georgia, and Mississippi

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amici curiae states that no counsel for any party authored this brief in whole or in part, and no such counsel or party, and no person other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have lodged letters granting blanket consent to the filing of amicus curiae briefs.

In the spirit of full disclosure, counsel for amici previously represented petitioner Russell Bucklew—but that representation ceased years ago.

Dave Cook
Director, Oregon Department of Corrections (1995-2002)

Jerry Givens
Captain, Virginia Department of Corrections (1974-1999); Executioner (1982-1999)

Martin Horn
Secretary, Corrections of Pennsylvania (1995-2000); Commissioner, New York City Department of Correction (2003-2009); Commissioner, New York City Department of Probation (2002-2009)

Steven Martin
Expert, U.S. Department of Justice, Civil Rights Division (1993-2008); Former Corrections Official, Texas Department of Corrections

Ron McAndrew
Prison and Jail Consultant-Expert Witness (2005-present); Director, Orange County Jail (2001-2002); Warden, Florida State Prison (ascended the uniform ranks) (1978-2001)

Doris Parlette
Regional Manager, Indiana Department of Child Services (2007-2008); Superintendent, Indiana Department of Correction (1990-2007)

Gayle Ray
Commissioner, Tennessee Department of Correction (2010-2011)

Chase Riveland
Secretary, Washington Department of Corrections (1986-1997); Executive Director, Colorado Department of Corrections (1983-1986)

Frank Thompson
Superintendent, Oregon State Penitentiary (1994-1998)

Eldon Vail
Secretary, Washington Department of Corrections (2007-2011); Deputy Secretary, Washington Department of Corrections (2000-2007)

Roger Werholtz
Interim Executive Director, Colorado Department of Corrections (2013); Secretary, Kansas Department of Corrections (2002-2010); Deputy Secretary, Kansas Department of Corrections (1987-2002)

Rex Zent
Various Positions, Ohio Department of Rehabilitation and Correction (1970-1997); Warden, North Central Correctional Institution (1994-1995); Warden, Madison Correctional Institution (1989-1994)

SUMMARY OF ARGUMENT

Participating in executions places a tremendous weight on the shoulders of the execution team, including corrections officers, prison chaplains, the medical team, the executioner, and the wardens or other officials who must oversee the process. Even when everything goes according to plan, standing face-to-face with an inmate and taking his life is a substantial burden to carry. The psychological consequences of this burden are well-documented and can be severe. When, as here, an execution is unlikely to go smoothly, and is likely to result in unnecessary pain and suffering, the burden of participation becomes unbearable. Such executions do not serve the State's interests in finality or justice. Instead, they make public servants parties to barbarism. This Court

should recognize that an execution under these circumstances violates the Eighth Amendment's prohibition against cruel and unusual punishment, and it should reverse the judgment below.

ARGUMENT

Executions take a steep toll on the people who oversee and perform them. A corrections employee's principal duty is to care for the inmates under his or her charge to the best of his or her ability, and consistent with the law. Intentionally taking human life runs counter to that duty, as well as society's basic norms—even if the person in question has committed a horrible crime. Moreover, an execution is one of the most solemn and weighty events in the justice system. The procedures are complex, and the cost of error is tremendous. The weight of the situation lands squarely on the execution teams' shoulders. Even in the best of circumstances, it is difficult to bear.

The psychological consequences of carrying this burden are well-documented, and can be severe. The most fortunate cope by distancing themselves from their humanity, relying on the legal process and a sense of duty to shield their psyche. *See* Tolly Moseley, *The Enforcers of the Death Penalty*, Atlantic (Oct. 1, 2014), https://www.theatlantic.com/health/archive/2014/10/the-enforcers-of-the-death-penalty/379901/; Michael J. Osofsky et al., *The Role of Moral Disengagement in the Execution Process*, 29 L. & Hum. Behav. 371, 385 (2005). Others fail to manage the trauma, resorting to alcohol or experiencing symptoms of post-traumatic stress including depression, flashbacks, nightmares, pain with no known physical origin, and dissociative disorders. *See* Lauren M. De Lilly, Note, *"Antithetical*

to Human Dignity": Secondary Trauma, Evolving Standards of Decency, and the Unconstitutional Consequences of State-Sanctioned Executions, 23 S. Cal. Interdisc. L.J. 107, 123-24 (2014). Some have even committed suicide. *See* Amanda Gil et al., *Secondary Trauma Associated with State Executions: Testimony Regarding Execution Procedures*, 34 J. Psychiatry & L. 25, 33 (2006).

Personal accounts of the trauma associated with performing executions are revealing. Dr. Allen Ault oversaw five executions in the State of Georgia. He explained that:

> Those of us who have participated in executions often suffer something very much like posttraumatic stress. Many turn to alcohol and drugs. For me, those nights that weren't sleepless were plagued by nightmares. My mother and wife worried about me. I tried not to share with them that I was struggling, but they knew I was.

Allen Ault, *Ordering Death in Georgia Prisons*, Newsweek (Sept. 25, 2011), https://www.newsweek.com/ordering-death-georgia-prisons-67483. Citing the psychological cost of participating in executions, Dr. Ault resigned his post and became an advocate against the death penalty. *Ibid.*

Donald Cabana, a former warden at the Mississippi State Penitentiary (better known as Parchman Farm), often stated that "[t]here is a part of the warden that dies with his prisoner." Bruce Weber, *Donald Cabana, Warden Who Loathed Death Penalty, Dies at 67*, N.Y. Times (Oct. 13, 2013), https://www.nytimes.com/2013/10/13/us/donald-cabana-

warden-who-loathed-death-penalty-dies-at-67.html. He commented that after an execution, "I was in the shower two hours later, scrubbing and scrubbing. Then I showered again. I just couldn't get the sweat and grime off me to the point where I felt clean enough to go to sleep." Ivan Solotaroff, *The Last Face You'll Ever See: The Private Life of the American Death Penalty* 201 (2001). Years later: "It hasn't come off me yet." *Ibid.* The trauma drove Cabana from his career in corrections, and he became a professor of criminology and an advocate against the death penalty.

Frank Thompson, a veteran, former law enforcement official, and former superintendent of Oregon's state prisons, is "continuously being informed, by those who have been personally and directly involved in executing someone, of the awful, lifelong repercussions that can occur as a result in carrying out executions." Frank Thompson, *Ex-warden: Death Penalty Doesn't Make Guards Safer*, Delaware Online (Apr. 1, 2015), https://www.delawareonline.com/story/opinion/contributors/2015/04/01/ex-warden-death-penalty-make-guards-safer/70791272/. He stated that "[m]any of us who have taken part in this process live with nightmares . . . Correctional officers who carry out execution can suffer from post-traumatic stress, drug and alcohol addiction, and depression." *Ibid.*

Jerry Givens, who carried out 62 executions for the Commonwealth of Virginia, explained that in order to do the job, "[y]ou have to transform yourself into that person that will take a life. Every time an execution was announced, it meant that I had to prepare myself mentally to kill." Selene Nelson, *How It Feels To Kill 62 People*, ThinkProgress (July 15,

2015), https://thinkprogress.org/how-it-feels-to-kill-62-people-963ff9f73afd/. Givens elaborates that "[y]ou can't tell me I can take the life of people and go home and be normal. . . . It took a lot out of me to do it." *Ibid.* Givens also noted that "[a]ll staff who volunteer to be part of an execution feel the stress," and he "pointed out that PTSD can reach all members of an execution team, no matter how indirect their involvement." Mike Pearl, *What It's Like To Be a Death Row Executioner in America*, VICE (May 27, 2015), https://www.vice.com/en_us/article/bnpxp5/how-do-you-get-a-job-as-an-executioner-in-america-526.

Jim Willett, who oversaw 89 executions in Texas,[2] had "no doubt that [executions are] disturbing for all of us. You don't ever get used to it." Bob Herbert, *In America; Inside the Death House*, N.Y. Times (Oct. 9, 2000), https://www.nytimes.com/2000/10/09/opinion/in-america-inside-the-death-house.html. He was forced to "wonder whether people really understand what goes on down here and the effect it has on us." *Ibid.* Also in Texas, Fred Allen, who participated in 130 executions as a member of the team that strapped inmates to the gurney, had a spontaneous breakdown as he reflected on his career. *Ibid.* And Ron McAndrew, who participated in eight executions in Florida and Texas, stated that "[a]t night I would awaken to visions of executed inmates sitting on the edge of my bed." Ron McAndrew, *Florida Must Abolish Flawed Death Penalty*, Orlando Sentinel (May 24, 2009),

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[2] Patrick Beach, *What Ever Happened to . . . Walls Unit Warden Jim Willett*, Austin American-Statesman (Feb. 23, 2013), https://www.statesman.com/news/local/what-ever-happened-walls-unit-warden-jim-willett/p7rgr6qSfOTBazGgS28TnN/.

http://articles.orlandosentinel.com/2009-05-24/news/edp_1_capital-punishment-death-row-death-penalty.

These examples illustrate the trauma that corrections employees undergo when participating in executions, even when an execution goes as smoothly as possible.

This case presents heightened risk because one of the principal sources of anxiety for corrections officials is the risk that an execution will be botched. Such situations not only impugn the competence of the people involved, but also make it impossible for them to dissociate from the horror of their task. Frank Thompson explained that he could not "put into words the anxiety I felt about the possibility of a botched procedure," and stated how—even after executions went as planned—the anxiety caused multiple staff members to have trouble sleeping, to ask not to serve as executioners again, or to seek employment elsewhere. Semon Frank Thompson, *What I Learned from Executing Two Men*, N.Y. Times (Sept. 16, 2016), https://www.nytimes.com/2016/09/18/opinion/sunday/what-i-learned-from-executing-two-men.html.

These fears are well founded in light of recent botched attempts at lethal injection. In the attempted execution of Doyle Lee Hamm—an inmate whose veins were compromised by cancer treatments—corrections employees spent hours attempting to access a vein without success. In the process, the State's refusal to call off the execution effectively forced its employees to torture Hamm, inflicting multiple puncture wounds that left Hamm covered in blood, suffering from an infection and a limp, with pooling of blood in his extremities. Bernard E. Harcourt, *The Barbarism of Alabama's Botched Execution*, N.Y. Rev. Books (Mar.

13, 2018), http://www.nybooks.com/daily/2018/03/13/the-barbarism-of-alabamas-botched-execution/. Hamm's story is the most recent and one of the most extreme, but it is by no means uncommon. The botched execution of Clayton Lockett is another prominent example of lethal injection gone horribly wrong—and indeed, since 1985, "there have been some two dozen reported cases in which executioners have struggled to find a usable vein." *Ibid.*

That very same risk looms large in this case. Mr. Bucklew's medical condition is rare, complex, extremely dangerous, and directly affects both his breathing and his blood vessels. As petitioner's brief explains, the State's medical team—which will be responsible for placing the needles in any lethal injection scenario—will have woefully inadequate information about that condition. Pet. Br. 7-8, 29, 32-34. It is unclear that the State has any reasonable plan for dealing with the specific complications in this case—including the need to keep Mr. Bucklew out of a supine position; the need to account for potential obstruction of his airway; the need to avoid bleeding; the challenges of accessing peripheral veins, and, if that fails, the difficulty of using a central line procedure. *Id.* at 8-15. There is a substantial probability that the process will be lengthy and will end only when Mr. Bucklew either suffocates or drowns in his own blood. *Id.* at 12-13, 43-44. Thus, the risk that public employees will be forced to participate in a gruesome, unconstitutional execution is intolerably high.

This Court simply should not countenance that risk. Regardless of Mr. Bucklew's crime, there is no reasonable justification for allowing the State to force

its public servants to administer lethal injection under these circumstances. The medical team and officers cannot have been properly trained for it, the objective evidence shows that the risk of a botched execution is extremely high, and the likely consequence of that botched execution will be permanent psychological scarring for everybody directly involved. That result does not further the State's interest in finality and justice, for it would only create new wounds by perpetrating a gross injustice. Moreover, such an execution is not what the Founders envisioned when they adopted the Eighth Amendment—and under any standard of basic decency, the law cannot allow it.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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